

STATE OF MICHIGAN
IN THE SUPREME COURT
(On Appeal From The Michigan Court Of Appeals)
[Meter, P. J. and Murray and Beckering, JJ.]

GREAT WOLF LODGE OF TRAVERSE CITY, LLC

Plaintiff-Appellee,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Defendant-Appellant,

and

CHERRYLAND ELECTRIC COOPERATIVE,

Defendant-Appellant.

SC: 139541-2 & 139544-5

COA Nos. 281398 & 281404

Ingham CC: 06-001484-AA

MPSC: U-14593

APPELLEE GREAT WOLF LODGE OF TRAVERSE CITY, LLC'S BRIEF

***** ORAL ARGUMENT REQUESTED *****



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STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

This Court has jurisdiction under MCR 7.301(A)(2) as this is an appeal after a decision of the Michigan Court of Appeals in *Great Wolf Lodge of Traverse City, LLC v PSC*, 285 Mich App 26; 775 NW2d 597 (2009) (Docket Nos. 281398 and 281404), issued on July 14, 2009.

Plaintiff-Appellee Great Wolf Lodge of Traverse City, LLC respectfully requests that this Court AFFIRM the Michigan Court of Appeals' decision in its entirety.

STATEMENT OF QUESTIONS INVOLVED

- I. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT CHERRYLAND DOES NOT HAVE AN AUTOMATIC RIGHT TO SERVE GREAT WOLF LODGE AND, THEREBY, CORRECTLY REMANDED THE CASE TO THE MICHIGAN PUBLIC SERVICE COMMISSION FOR DETERMINATION OF WHETHER CHERRYLAND HAD THE AUTHORITY TO REQUIRE GREAT WOLF LODGE TO BE SERVED BY CHERRYLAND AFTER DEVELOPMENT OF A FULL FACTUAL RECORD.**

Plaintiff-Appellee Great Wolf Lodge says YES.

Defendant-Appellant Michigan Public Service Commission says NO.

Defendant-Appellant Cherryland Electric Cooperative says NO.

- II. WHETHER THE COURT OF APPEALS CORRECTLY AFFIRMED THE CIRCUIT COURT'S DETERMINATION TO REMAND TO THE PSC FOR A DETERMINATION OF INTEREST WHERE THE RECORD SHOWS THAT CHERRYLAND CHARGED GREAT WOLF LODGE AN IMPROPER AND UNAUTHORIZED RATE AND HAD THE BENEFIT OF GREAT WOLF LODGE'S FUNDS DUE TO THE CHARGING OF AN UNAUTHORIZED RATE.**

Plaintiff-Appellee Great Wolf Lodge says YES.

Defendant-Appellant Michigan Public Service Commission says NO.

Defendant-Appellant Cherryland Electric Cooperative says NO.

- III. WHETHER THE COURT OF APPEALS CORRECTLY DETERMINED THAT THIS MATTER SHOULD BE REMANDED FOR A DETERMINATION OF FINES WHERE THE RECORD SHOWS THAT CHERRYLAND CHARGED AN UNAUTHORIZED RATE, IN DIRECT CONTRADICTION TO THE COMMISSION'S DIRECT ORDER AND THAT THE PLAIN MEANING OF THE STATUTE REQUIRES A FINE WHERE THE UTILITY NEGLECTS TO CHARGE A REQUIRED RATE.**

Plaintiff-Appellee Great Wolf Lodge says YES.

Defendant-Appellant Michigan Public Service Commission says NO.

Defendant-Appellant Cherryland Electric Cooperative says NO.

APPELLEE GREAT WOLF LODGE OF TRAVERSE CITY, LLC'S BRIEF

I. STATEMENT OF FACTS

A. NATURE OF THE ACTION AND CHARACTER OF PLEADINGS AND PROCEEDINGS

This matter arises from a summary disposition order by the PSC, a partial affirmance and partial reversal of that order by the Ingham County Circuit Court, and an Opinion by the Court of Appeals largely reversing the PSC and requiring the development of “a full factual record” since no hearing had been held below.

The summary disposition related to a complaint filed by Plaintiff-Appellee Great Wolf Lodge of Traverse City, LLC (“Great Wolf Lodge”) on July 13, 2005 against the Cherryland Electric Cooperative (“Cherryland”). The complaint, among other things, sought a hearing to address the issue of whether Great Wolf Lodge had the ability to choose its electric supplier (from among 3 providers with facilities already on the property) at the time it purchased the vacant and unserved property on which it was to build its resort in 2002.

The PSC issued its Opinion and Order on May 25, 2006. The Opinion and Order is at the PSC's Appendix, pp. 65a – 84a. The Opinion and Order dismissed, without a hearing, Great Wolf Lodge's claims that it was wrongly coerced to take electric service from Cherryland when it was not legally required to do so, and found that Great Wolf Lodge was forever bound as an “existing customer” of Cherryland because a prior owner had at one time taken service at the site of the real estate at a building that was no longer being served and in fact no longer existed at the time of the sale of the property in March 2002.

On November 21, 2006, Great Wolf Lodge filed a Complaint for Judicial Review at the Ingham County Circuit Court, which action forms the basis for the instant appeal. On October 2,

2007, the Ingham County Circuit Court issued its Opinion and Order. The Circuit Court's Opinion and Order is at the PSC's Appendix, pp. 85a – 98a.

Great Wolf Lodge and the PSC applied for leave to appeal that decision to the Court of Appeals (Cherryland did not appeal the Circuit Court decision). The Court of Appeals granted both applications. On July 14, 2009, the Court of Appeals issued its Opinion that is the subject of the PSC's and Cherryland's appeal before this Court. *Great Wolf Lodge of Traverse City, LLC v PSC*, 285 Mich App 26; 775 NW2d 597 (2009). The Court of Appeals' decision is contained in the PSC's Appendix at pp. 99a – 106a, and in Cherryland's Appendix at pp. 845a – 855a.

Both the PSC and Cherryland sought leave to appeal the Court of Appeals' decision in this Court. This Court granted leave to appeal on April 9, 2010.

B. UNDERLYING FACTS AND SUBSTANCE OF PROOF.

At the outset, Great Wolf Lodge notes that Appellants, and especially Cherryland, reference attachments to a motion for summary disposition as if those were proofs of facts. In fact, they are not. There is no hearing record below, and the attachments below that the parties reference are not undisputed by Great Wolf Lodge. Some items are depositions of persons taken in another action. Great Wolf Lodge seeks its hearing on its complaint at which facts will be proven by testimony, cross examination, and exhibits that must be supported by a foundation and testified to by witnesses subject to cross examination pursuant to the PSC's hearing rules. With that in mind, Great Wolf Lodge will present its counter statement of the background facts of the case, of necessity relying on similar documentation.

In 2001, Great Wolf Lodge planned to make a major investment in Michigan to build and operate a resort near Traverse City, Michigan. At that point in time, however, Great Wolf Lodge did not yet own all of the property on which the Resort was to be built. One parcel of property,

the Oleson farm, had once been owned by the Oleson family. At some point when the Olesons owned the farm Cherryland provided electric service to up to three buildings on the property.

After the death of Mr. Oleson, Senior, the property passed to GDO Investments, according to Jack Smith, a representative of GDO Investments.. Deposition of Jack Smith, p. 6, Appellee's Appendix, p. 7b. GDO Investments maintained electric service from Cherryland to one or more of the buildings until approximately September 2001. Deposition of Jack Smith, pp. 12 and 19, Appellee's Appendix, pp. 8b and 10b.

GDO Investments still owned the property in January 2002, when its agent Mr. Smith requested removal of the remaining electric lines attached to the buildings (called "service drops") so the buildings could be demolished and a hill be excavated. Cherryland, on January 10, 2002, refused to remove its service line from the abandoned buildings absent an agreement from the prospective future owner to accept electric service from Cherryland and no other provider. Deposition of Jack Smith, pp. 13-15, Appellee's Appendix, pp. 8b -9b. Cherryland's Appendix, p. 259a. Previously, on January 3, 2002, Cherryland had been informed by J. Michael Schroeder, Senior Vice President and General Counsel for Great Lakes Companies, that a start date of February 1, 2002 was critical to the success of Great Wolf Lodge's planned project. Cherryland's Appendix, pp. 261a – 262a. Deposition of J. Michael Schroeder, pp. 19-21, Appellee's Appendix, p. 3b.

Cherryland thereby prevented construction of the Great Wolf Lodge unless the Lodge took the risk of losing an entire season's revenue. As J. Michael Schroeder explained in his deposition in the lawsuit brought by Traverse City Light & Power against Cherryland:

- A. ...Cherryland came to us and through a combination of threats to be unwilling to cooperate and enticements to make their offer more attractive than it had been originally, put us in a position where due – primarily due to the possible delays to the project arising out of

the threats not to remove the lines and that sort of thing, that we felt we had no choice but to go with Cherryland as our electric power supplier. It was our view that anything that was going to stall the project was unacceptable for financial reasons.

Q (by Cherryland's counsel): *Did you believe that you were coerced by Cherryland to switch providers to Cherryland?*

A. *That's your word, but that's a decent characterization.*

Deposition of J. Michael Schroeder, p. 60, Appellee's Appendix, p. 4b.

Cherryland has never disputed that in January 2002 the property was owned by GDO Investments and not by Great Wolf Lodge.

On July 14, 2000, Great Lakes Companies entered into an option agreement to buy the property on which these buildings stood. The agreement was an option that Great Lakes Companies could have walked away from or forfeited if monthly option payments were not made. If the sale was completed, the option payments were a credit to the purchase price. The sale did not close until March 5, 2002. Deposition of Jack Smith, pp. 6-7, Appellee's Appendix, p. 7b. Thus, Cherryland's refusal to remove the service drop absent agreement to use Cherryland's electric service took place before Great Lakes completed the purchase of the property on March 5, 2002 (*i.e.*, after the prior buildings had been demolished).

The property was situated at a location where three electric service providers had facilities. Deposition of Jack Smith, p. 16, Appellee's Appendix, p. 9b. At the time at issue in this case, in January 2002, no "building or facility" was being served on the property. A small distribution line owned by Cherryland remained on the property, but it was not serving any building or facility, and any buildings and facilities had been abandoned. Cherryland claims it was undisputed that the property was served by Cherryland since the 1940s, but that is not undisputed as Cherryland claims. Rather, the question has not been addressed in a record

because even if that was the case it does not matter since no “buildings and facilities” on the property were being served at the time in question as required.

Because no buildings or facilities were being served by any electric service provider, Great Wolf Lodge entered into negotiations to buy the property with every reason to believe that it had a choice of electric suppliers. Great Wolf Lodge then solicited competitive bids in 2001 to obtain electric service to the planned Resort.

All three electric service providers (two utilities and one non-utility municipal provider) with a presence on the property -- Cherryland, Consumers Energy Company, and Traverse City Light & Power -- submitted formal competitive bids to provide service to Great Wolf Lodge. There was no formal request for service from any of the three providers because Great Wolf Lodge did not yet own the property and the project still could have been cancelled.

Traverse City Light & Power was the winning bidder, and Cherryland’s bid and Consumers’ bid were rejected. Based on the completed bidding process, Great Wolf Lodge entered into a contract with Traverse City Light & Power in December 2001 to take electric service at the Resort. This contract was later found to be valid and enforceable in the Grand Traverse County Circuit Court in its adoption of a case evaluation award in Case No. 02-22514.

The owners of the property thus began efforts to make the property ready for conveyance and construction, and requested that the old distribution line owned by Cherryland be removed so that abandoned buildings could be demolished. Cherryland did not contest the bidding process or make a claim of entitlement to serve the property until December 21, 2001. Cherryland’s Appendix, p. 261a.

Cherryland, knowing Great Wolf Lodge had already signed a contract for electric service with Traverse City Light & Power, responded to the owner that it would remove the single line at

the abandoned building only if there was a confirmation in writing that the removal was directly related to the necessity to demolish presently existing buildings to facilitate construction of new facilities, and a commitment that Cherryland (the losing bidder) and no other supplier would be the electric provider to the planned, new Resort. Cherryland's Appendix, p. 259a.

At this point, Great Wolf Lodge faced a Hobson's choice. It could not raze the old Oleson buildings and commence construction of the Resort unless the service drop was removed. And it had only two means to achieve removal of the line – it could accede to Cherryland's improper and coercive demand, or sue Cherryland for trespass for refusing to remove the service drop. To bring suit would bring uncertainty and inevitable delay. Such a course would do untold financial damage to Great Wolf Lodge, as it would be unable to open on schedule for the resort season. Deposition of J. Michael Schroeder, p. 60, Appellee's Appendix, p. 4b.

Great Wolf Lodge was thus forced, against its will, to end its contract with Traverse City Light & Power and temporarily accept electric service from Cherryland for the Resort under a three-year contract, based on the threats made by Cherryland. Following Great Wolf Lodge's decision under great duress to succumb to Cherryland's coercion and abrogate its valid contract with Traverse City Light & Power, Traverse City Light & Power sued Cherryland in Grand Traverse County Circuit Court, Case No. 02-22514-CZ, for tortious interference with contract and business expectancies, alleging that Cherryland wrongfully forced Great Wolf Lodge to terminate its contract with Traverse City Light and Power. The case was settled when both parties accepted a mediation award of \$275,000 against Cherryland and in favor of Traverse City Light & Power, which became the judgment of the Court.

Cherryland then proposed to serve Great Wolf Lodge, and did so for a time, under a new Large Resort Service ("LRS") rate, a rate that was not previously approved by the MPSC, as

required by law. In a docket separate from the docket appealed from, PSC Case No. U-13716, the PSC rejected the proposed LRS tariff overall but ordered the actual rate (*i.e.*, the price for the electricity) to continue for a period of one year on the grounds it should be a “special contract” and not generally available under a tariff, since Great Wolf Lodge would be the only customer served under the LRS tariff. The MPSC stated the purpose of the Order was to not prejudice Great Wolf Lodge, the customer, and found specifically that the Large Resort Service Rate was “just and reasonable” for Great Wolf Lodge to pay in the meantime. The Order is provided in the PSC’s Appendix, pp. 1a – 14a.

Cherryland then submitted a proposed special contract to Great Wolf Lodge. Among other things, the proposed special contract imposed unconscionable late charges and required Great Wolf Lodge by contract to forever bind itself to Cherryland’s electric distribution service. Great Wolf Lodge excepted to such an arrangement, and sought changes to the special contract to reflect its position that it should be restored to the position it had been in prior to Cherryland wrongfully forcing Great Wolf Lodge into taking service during the construction period.

Cherryland then unilaterally requested the PSC to approve the special contract Great Wolf Lodge objected to and had not signed. In Case No. U-14240, the PSC dismissed Cherryland’s request, finding it premature as the parties had not in fact agreed on a special contract. The PSC also stated that the parties “were free to petition the Commission, if necessary, to seek resolution of any underlying dispute” with regard to the proposed special contract (which Great Wolf Lodge would later do only to be denied a hearing). MPSC Order, Case No. U-14240, October 14, 2004. The Order is at PSC Appendix, pp. 17a – 20a.

C. GREAT WOLF LODGE’S COMPLAINT BELOW

While Case U-14240 was pending, Great Wolf Lodge and Cherryland re-commenced negotiations on a proposed special contract. Then, after the dismissal of the special contract

application, Cherryland unilaterally stopped charging Great Wolf Lodge the Commission-ordered rate and began charging Great Wolf Lodge the much higher large commercial and industrial rate – an action the PSC’s administrative law judge found was calculated to pressure Great Wolf Lodge into signing a contract with which it disagreed. Cherryland’s Appendix, pp. 634a – 635a. Upon inquiry by Great Wolf Lodge, Mr. Anderson of Cherryland provided an e-mail message to Great Wolf Lodge in January 2005 claiming Cherryland was basing its unilateral change on a provision of the previously disapproved LRS tariff requiring a minimum energy usage. Cherryland Appendix, p. 185a.

When further negotiations again broke down, on July 13, 2005, Great Wolf Lodge filed a two-count complaint in the instant case against Cherryland. PSC Appendix, pp. 21a – 31a. Count I of the complaint dealt with Cherryland’s unilateral decision in November 2004 to disregard the PSC’s order of July 22, 2004 and to begin charging Great Wolf Lodge under the much higher LC&I tariff. Great Wolf Lodge was awarded a refund of the improper charges under Count I. The refund was not appealed. In fact, Count I is not at issue in this appeal except for the PSC’s failure to award any interest to Great Wolf Lodge and to assess the mandatory fines against Cherryland.

Count II sought a ruling requiring Cherryland to enter into a special contract consistent with the MPSC’s holdings in Case Nos. U-13716 and U-14240, and to hold that, upon completion of its temporary special contract with Cherryland, that Great Wolf Lodge may elect to receive all components of electric service from any provider of its choosing. Great Wolf Lodge also requested a further ruling that, if it did elect a provider other than Cherryland, that Cherryland be required to fully cooperate in the transfer of service to that new provider, including without limitation the transfer of any necessary facilities to the new provider on

reasonable terms, the removal of any Cherryland facilities that need to be removed in order to allow the provision of service by a new provider, the termination of Great Wolf Lodge's membership in Cherryland, and any other actions reasonably necessary to effect the change, all without cost or loss to Cherryland.

D. THE PSC'S RULINGS

Cherryland filed a motion for summary disposition before the PSC. On October 24, 2005, the PSC's Administrative Law Judge ("ALJ") issued a ruling granting summary disposition in favor of Great Wolf Lodge as to Count I, and granting summary disposition in favor of Cherryland as to Count II. PSC Appendix, pp. 49a – 64a. On February 22, 2006, the ALJ issued a Proposal for Decision ("PFD") on the remaining issues in the case. The ALJ found Cherryland liable for an overcharge for using the wrong rate in the total amount of \$72,550.16, plus interest. The ALJ also recommended that fines in the amount of \$44,250 be assessed, and that Cherryland cease and desist from further violations of MPSC orders. The ALJ was not persuaded by Cherryland's claims that the change in rates related to concerns about being fined for failing to charge Great Wolf Lodge under a tariff provision. The ALJ concluded that "Cherryland's actions equate to a purposeful and flagrant violation of the Commission's Order, dated July 22, 2005." Cherryland's Appendix, p. 637a.

Following the briefs, the Proposal For Decision, Exceptions, and Replies to Exceptions, the PSC issued its Opinion and Order on May 25, 2006. PSC Appendix, pp. 65a – 84a. The PSC dismissed, without a hearing, Count II to the complaint, and granted a refund to Great Wolf Lodge on Count I. The PSC later denied rehearing.

E. THE CIRCUIT COURT'S RULING.

On September 20, 2006, Plaintiff filed a timely Claim of Appeal of the MPSC's Orders in the Michigan Court of Appeals. On October 25, 2006, the Michigan Court of Appeals entered an

Order Transferring this Appeal to the Ingham County Circuit Court pursuant to MCL 462.26(3). On November 21, 2006, Great Wolf Lodge filed a Complaint for Judicial Review at the Ingham County Circuit Court.

On October 2, 2007, the Ingham County Circuit Court issued its opinion. See PSC Appendix, pp. 85a – 98a. The Circuit Court granted Great Wolf Lodge relief on some issues, but denied relief on the issue of whether Great Wolf Lodge was entitled to a hearing on the issues in the special contract and to show it was allowed to choose its electricity provider in 2002. The Circuit Court considered itself bound by a ruling in the Court of Appeals in *Consumers Energy v PSC*, 255 Mich App 496; 660 NW2d 785 (2002), a decision the Court of Appeals itself would distinguish from this case. Great Wolf Lodge and the PSC then sought leave to appeal at the Court of Appeals. Cherryland did not seek leave to appeal.

F. THE COURT OF APPEALS DECISION.

On July 14, 2009, the Court of Appeals issued the decision that is the subject of this appeal by the PSC and Cherryland. PSC Appendix, pp. 99a – 106a. The decision remanded the matter to the PSC to develop “a full factual record” on Great Wolf Lodge’s claim that it is entitled to select its electricity supplier, and to determine the proper amount of fines and interest due. The specifics of the Court of Appeals decision will be addressed in the arguments sections.

II. ARGUMENT

A. STANDARD OF REVIEW

The same standard of review applies to each of the three issues set forth in this Court’s Order granting leave to appeal, and, therefore, will be addressed as it applies to all issues in this brief.

The original appeal in this case to the Ingham County Circuit Court was brought pursuant to MCL 462.26. and that statute governs the appeals to the Court of Appeals and to this Court.

MCL 462.26(8) prescribes the standard of review to be applied in an appeal of an order of the PSC:

(8) In all appeals under this section the burden of proof shall be upon the appellant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable.

Under this standard, orders of the PSC must be reversed on appeal if they are unlawful or unreasonable. The appellate court reviews the issue of whether a Commission order is unlawful *de novo* as a question of law. An order of the PSC is unlawful if it is based on an erroneous interpretation or application of the law. An order is also unlawful if the PSC was guilty of an abuse of discretion. *Verizon North v MPSC*, 260 Mich App 432; 677 NW2d 918 (2004). An order of the MPSC is unreasonable if the evidence does not support it. *Attorney General v MPSC*, 262 Mich App 649; 686 NW2d 804 (2004).

This appeal involves actions by an administrative agency, the PSC, of (1) the legal interpretation of an administrative rule, MAC R 460.3411, and a statute, MCL 124.3, and the interplay between the rule and the statute, (2) an interpretation of the law regarding the addition of interest as an element of damages, and (3), an interpretation of two related statutes, MCL 460.552 and MCL 460.558, as to whether a fine is required by law.

This Court has clarified the standard to be applied in judicial review of an administrative agency's interpretation of a statute and of *de novo* review of such interpretations. This Court made clear that the same standards apply as apply to appeals of a lower court's interpretation, which is apropos here as this appeal is not only of the PSC's interpretation but of the Court of Appeals' interpretation as well.

In *SBC Michigan v PSC (In re Complaint of Rovas)*, 482 Mich 90, 103; 754 NW2d 259 (2008), the Supreme Court stated the standard as follows:

This Court announced the proper standard of review for agency statutory construction more than 70 years ago in *Boyer-Campbell v Fry*, [footnoted as 271 Mich 282; 260 NW 165 (1935)] which dealt with the proper construction of the General Sales Tax Act. The *Boyer-Campbell* Court held that

the construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. However, these are not binding on the courts, and [w]hile not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature. [citing *Boyer-Campbell* at 296-297 (internal citations and quotation marks omitted)]

This standard requires "respectful consideration" and "cogent reasons" for overruling an agency's interpretation. Furthermore, when the law is "doubtful or obscure," the agency's interpretation is an aid for discerning the Legislature's intent. However, the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue.

This Court indicated that the Court of Appeals in that case had used a deferential standard and had thereby “abdicated its judicial authority to construe statutes.” *SBC Michigan v PSC*, slip op at 19.

This Court, in exercising its judicial authority to construe statutes, must give the words of a statute their plain and ordinary meaning, and only where the statutory language is ambiguous may the court look outside the statute to interpret it. *DiBenedetto v West Shore Hospital*, 461 Mich 394; 605 NW2d 300 (2000). The usual rules of statutory construction also apply to administrative rules. *People v Wujkowski*, 230 Mich App 181; 583 NW2d 257 (1998). Thus, this Court must interpret the administrative rule before it in the same way it construes a statute.

The PSC possesses no common-law powers but is a creature of the Legislature, and all of its authority must be conferred by clear and unmistakable language in specific statutory

enactments, because doubtful power does not exist. *Union Carbide Corp v PSC*, 431 Mich 135, 146, 151; 428 NW2d 322 (1988); *Consumers Power Co v PSC*, 189 Mich App 151, 176; 472 NW2d 77 (1991).

Despite this decision, Cherryland and the PSC argue that the PSC's order in this case is entitled to judicial deference because the interpretation of MAC R 460.3411 is longstanding, basically equating respectful consideration with deference. The PSC cites to a case reinstating a longstanding policy without cogent reasons. However, as stated in *SBC Michigan v PSC, supra*, at p 103, "However, the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue." In this case the language of the rules and the statutes are dispositive without looking at "longstanding" policies that are not consistent with the plain meaning of those rules and statutes.

Cherryland cites to a deference standard regarding the PSC's interpretation of its past orders. That is not the case. This case involves the PSC's interpretation of administrative rules and statutes. In taking this approach, Cherryland claims this Court's review is limited and that the Court of Appeals failed to give respectful consideration to the PSC's interpretation of R 460.3411 and should have upheld it absent "cogent reasons."

It is difficult to imagine how more cogent the Court of Appeals' reasons were. If the PSC interprets a rule in a manner contrary to the plain meaning of its words, and attempts to apply the rule to prevent providers outside its jurisdiction from providing electric service, those are cogent reasons to overrule the PSC's interpretation. The Court of Appeals in this case, acting adjudicatively, found that the PSC's interpretation was wrong based on the plain words of the rule itself. Cherryland's restrictive standard of review should be rejected.

B. THE COURT OF APPEALS CORRECTLY HELD THAT CHERRYLAND DOES NOT HAVE AN AUTOMATIC RIGHT TO SERVE GREAT WOLF LODGE AND, THEREBY, CORRECTLY REMANDED THE CASE TO THE MICHIGAN PUBLIC SERVICE COMMISSION FOR DETERMINATION OF WHETHER CHERRYLAND HAD THE AUTHORITY TO REQUIRE GREAT WOLF LODGE TO BE SERVED BY CHERRYLAND AFTER DEVELOPMENT OF A FULL FACTUAL RECORD.

The first issue addressed in this Court's Order granting leave to appeal is:

Whether Cherryland Electric Cooperative is entitled to provide any component of electric service to Great Wolf Lodge of Traverse City or its buildings and facilities.

PSC Appendix, p. 107a.

Inherent in this issue are several sub-issues, such as whether statutes and administrative rules give Cherryland an inherent right to provide service to the parcel of property now owned by Great Wolf Lodge or whether the plain meaning of the administrative rule involved only provides for service to continue to buildings and facilities that actually exist. Another inherent issue is the interplay between MAC R 460.3411, which applies only to PSC-regulated electric utilities, and MCL 124, which applies to municipal electric utilities.

The basic issue in this case is the status of Great Wolf Lodge and Cherryland at the time that Great Wolf Lodge bought the property where the Lodge now stands, *i.e.*, whether Great Wolf Lodge was a customer of Cherryland or already receiving service from Cherryland at that time. The Court of Appeals correctly held that a factual issue exists that was not allowed to be developed below because of the summary disposition. That ruling should not be disturbed.

1. Great Wolf Lodge Was Not An Existing Customer Of Cherryland.

While other issues are involved, this case is not overly complicated. Cherryland claims that Great Wolf Lodge was at all times an existing customer and therefore could not transfer its service to another provider. This is based on subsection 2 of MAC R 460.3411 ("Rule 411"),

which provides that “Existing customers shall not transfer from one utility to another.” Rule 411(1)(a) defines “customer” as the “buildings and facilities served rather than the individual, association, partnership, or corporation served.” Appellee’s Appendix, p. 65b.

Rule 411 by its express terms provides that, in order to prevent Great Wolf Lodge from obtaining service from TCL&P, two conditions would BOTH have had to be met:

1. Great Wolf Lodge would have to be an “existing customer” of Cherryland; AND
2. Great Wolf Lodge’s contract with TCL&P would have to constitute a transfer “from one utility to another.”

Neither of these conditions were met. In spite of this, the PSC dismissed Great Wolf Lodge’s complaint without allowing Great Wolf Lodge the opportunity to develop the factual record showing that these two factual conditions were not met. This was error by the PSC, and the Court of Appeals correctly remanded to correct that error.

Nothing in Rule 411 dictates that once a property has been serviced, the property itself remains a customer for all time regardless of whether service itself is discontinued or what becomes of the property itself. Rather, Rule 411 merely provides that an existing customer cannot transfer service to another regulated provider. But, once service is discontinued to the buildings and facilities served, as it had been in this case for some time, and the buildings and facilities served no longer even exist, the property itself does not remain a “customer” into perpetuity. Rather, at that point the “customer,” the buildings and facilities served, no longer exists because there are no buildings and facilities being served.

The property in question had been operated as a farm for several years by the Oleson family. After the death of one of the Olesons, the property passed to GDO Investments, which maintained electric service to the house and garage. During that period there was electric service

provided by Cherryland to up to three buildings on the property. Thus, under Rule 411, those buildings and not the parcel were a Cherryland customer during that time period.

On July 14, 2000, Great Lakes Companies entered into an option agreement to buy the property on which these buildings stood. Deposition of Jack Smith, pp. 6-7, Appellee's Appendix, p. 7b. Therefore, Great Lakes Properties did not own the buildings that were served at that time.

In September 2001 GDO Investments' last tenant moved out, and electric service was discontinued to the buildings and facilities at that time. Deposition of Jack Smith, pp. 12 and 19, Appellee's Appendix, pp. 8b and 10b. On January 3, 2002, GDO Investments requested that the service drop line be removed so the existing, abandoned buildings could be demolished, which they were after Cherryland forced Great Wolf Lodge under duress to abrogate its agreement with Traverse City Light & Power and to agree to buy electricity from Cherryland. This all took place before Great Lakes purchased the property on March 5, 2002 (*i.e.*, after the prior buildings had been demolished).

Thus, the buildings were removed before Great Wolf Lodge purchased the underlying property. There were no buildings or facilities to be served on the property. Therefore, there was no "existing customer," as plainly defined in the rule, on the property. However, even if the Commission accepted as fact what is claimed by Cherryland, there remained, at a minimum, a factual dispute as to whether service had been abandoned to the buildings and facilities served. Yet, despite the existence of factual issues, the PSC decided the matter on a summary basis. The abandonment of service to "the buildings and facilities served" should not have been disposed of summarily. The Court of Appeals correctly recognized this, and that ruling should not be disturbed.

The PSC cites as authority its own prior rulings that “the site itself is the ‘customer,’ not the corporation or individual who owns the site.” PSC brief, p. 19. However, that prior ruling is contrary to the plain words of Rule 411, which state that the customer is “the buildings and facilities served” and not the site itself. In interpreting its own rule, the PSC cannot make up its own meaning, especially where, as here, the rule provides expressly otherwise. Moreover, the PSC ignores the wording of Rule 411(2), which only prohibits transfers by “existing customers,” meaning that it is not enough to be a customer, but there must be an existing customer.

Cherryland challenges the Court of Appeals’ ruling on the basis that Rule 411(11) provides that the first utility serving a “customer” is entitled to serve the entire load on the premises of that customer. However, Cherryland’s argument assumes the underlying issue – whether Great Wolf Lodge is a customer – as the basis for its conclusion. As indicated above, customer is a defined term, and that term is expressly limited to the buildings and facilities served. There were no buildings or facilities served at the time Great Wolf Lodge purchased the property as those buildings and facilities no longer existed. Rule 411(11) simply does not apply unless Rule 411(2) applies. As indicated above, Rule 411(2) does not apply because Great Wolf Lodge was not an existing customer, and had never been a customer.

Cherryland also argues that the Court of Appeals’ decision renders Rule 411(11) nugatory. That is not the case. Again, the Rule by its express terms only applies where there is an existing customer, not to where there once was a customer. Similarly, Cherryland argues that the Court of Appeals’ decision will bring down the entire regulatory system by allowing any old customer to unilaterally end the customer relationship. A customer can already do that by simply discontinuing service and moving out. Moreover, the decision by the Court of Appeals presupposes that the customer (the buildings and facilities) no longer exist, a change in

ownership, and that the new facilities are within multiple service areas. This last item eliminates most scenarios right off the bat. Keeping Rule 411 within the four corners of the rule itself will not change the regulatory system.

Cherryland also argues that Rule 411 applies whenever the utility ever “served a customer” on the premises. That interpretation turns the express language of Rule 411 on its head. The rule specifically provides that the premises is not the customer. Only the buildings and facilities served are customers. So the issue of whether Cherryland ever served a customer is irrelevant. Rule 411 only prevents transfers of service for “existing” customers. The issue under the plain words of the rule is whether Cherryland was serving the buildings and facilities placed on the premises by Great Wolf Lodge, not whether Cherryland served other customer(s) (*i.e.*, buildings and facilities) on the premises in the past. Where those buildings and facilities no longer exist, there is no “existing” customer. There is absolutely nothing in Rule 411 to support Cherryland’s claim that because there was a customer on the premises in the past, that Cherryland somehow has a right in perpetuity to serve any new building or facility that might be built on the premises where there is a gap in service because no buildings or facilities exist for a while. Again, there must be an “existing” customer, not a customer at some point in the past.

There is also no support in the plain meaning of Rule 411 for Cherryland’s claim that its right to serve is not negated by a service interruption, the destruction of buildings receiving service, or a change in ownership. Under Cherryland’s interpretation, there could never be an end to the status of a “customer.” The word “existing” would be a nullity because Cherryland’s interpretation is that once a customer, always a customer, regardless of what happens. The Court of Appeals correctly recognized that Rule 411 did not create permanent rights. There must be an

existing customer. Service to buildings and facilities in 1940 does not matter if those facilities do not exist and are not an existing customer at the time of the sale of the property.

Nor does Cherryland's insistence that it kept its facilities active on the premises of any consequence. First, there is no record on that point. Cherryland claims the line was energized, but that conflicts with statements from the prior owner that service was discontinued in September 2001, months before the request to remove the line. Second, Rule 411 does not make the determination of what is an existing customer dependent upon whether the utility has facilities ready to serve a potential customer. Rather, the plain wording of Rule 411 is that the existing customer is the building and facilities being served, not the facilities allegedly ready to provide service. Third, Cherryland's position is disingenuous. In this case the existing building was to be razed and would no longer have existed but for Cherryland's improper and illegal refusal to remove the service drop. Thus, under the plain meaning of Rule 411's definition of "customer," there was at that point no existing customer at all because the buildings and facilities served no longer existed. Cherryland cannot be allowed, through its misconduct, to claim that Great Wolf Lodge's facilities were being served when Cherryland itself refused to remove the service line at the request of the prior owner.

Cherryland also argues that the Court of Appeals' test has already been met because it is undisputed that the customer requested the removal of Cherryland's service drop for the specific purpose of changing service providers. That is untrue. Cherryland cannot make something so simply by stating it. The premises were abandoned. The prior owner sought to convey vacant land and wanted the buildings demolished. The intent cannot be presumed without a hearing. As the Court of Appeals found, there was no factual record on which to base such a finding.

That was the reason for the remand, and Cherryland's presumptions as to motive do not provide such a factual record.

The previous owners in this case had abandoned the "buildings and facilities served" and had requested removal of the service drop to allow demolition of the buildings and facilities before Great Wolf Lodge acquired the property and built the Resort. Cherryland used its threat of delaying construction of the Lodge, and forcing the Lodge to potentially miss an entire Spring season, in an attempt to resurrect that which was abandoned and prevent Great Wolf Lodge from lawfully selecting its own electric provider as a new customer.

2. The Court Of Appeals Correctly Found That *Consumers Energy Company v PSC*, 255 Mich App 496; 600 NW2d 785 (2002) Does Not Apply Where Great Wolf Lodge Was To Be Served By A Municipal Electric Provider Not Subject To MAC R 460.3411

Both the PSC and Cherryland claim that the Court of Appeals decision in this case is contradictory to the decision in *Consumers Energy Company v PSC*, 255 Mich App 496; 600 NW2d 785 (2002) ("*Consumers Energy*"). However, *Consumers Energy* does not apply, and does not mean what the PSC and Cherryland argue that it means.

In *Consumers Energy*, Meijer (the party claiming it was not required to take electric service from Consumers) had bought three parcels at three different times. Consumers had provided power to at least one of the parcels even after Meijer had purchased the property (Thus, Meijer was a "customer" and a "transfer" was involved, unlike in this case). The Court of Appeals found that Meijer tried to time its purchases of the parcels to avoid looking like the discontinuation of service was simply part of the change of ownership. Thus, the Court of Appeals held that Meijer's purchase of the parcels did not give it the right to change to a new utility because the *property* had always been an existing customer of Consumers. The Court of

Appeals found that the fact of discontinuance to two of the three parcels was of no consequence in such circumstances.

From this ruling the PSC and Cherryland expand upon the Court of Appeals' language and claim the case stands for the proposition that the "customer" is the parcel of land involved and not the "buildings and facilities served", as the term is defined in the statute. That is not what the statute says, and is not what *Consumers Energy* actually held. As the Court of Appeals found in this case, the statements in *Consumers Energy* referred simply to property upon which an existing customer stood, such that extensions of service upon the property should be the business of the incumbent utility. This presupposes that Meijer in that case was an existing customer so that extensions on Meijer's premises would be the business of the incumbent utility as well. Here the issue of whether Great Wolf Lodge is an existing customer is not presupposed, as the previous argument indicates, because there was no customer to be served.

Moreover, the facts of this case are completely different from those in *Consumers Energy*. Although Cherryland had previously served a now vacant and abandoned building on the site, this service had been discontinued, and the removal of the line had been requested, but intentionally refused. Cherryland was thus not serving the property in January 2002 when the removal of the service drop was refused. In fact, Cherryland was an illegal trespasser once the owner requested removal and Cherryland refused. The presence of a utility service drop, absent an explicit grant of right to occupy the land, is a revocable easement, which under Michigan law is *revocable at will* and does not run with the land. *McCastle v Scanlon*, 337 Mich 122; 59

NW2d 114 (1953).¹ Thus, when Cherryland was ordered to remove the line, Cherryland's refusal to remove it amounted to a trespass. See, for example, *Ward v Rapp*, 79 Mich 469, 470; 44 NW 934 (1890). (Where the right to be present on land exists pursuant to a revocable license, continued presence on the land after the revocation of that license is a trespass).

In this case no buildings or facilities were being served because the buildings to which service had been provided had been abandoned and the removal of the service drop had been demanded by the prior owner. There was NO service to this property, unlike in *Consumers Energy* where Meijer was already taking service even after acquiring the property.

Consequently, the PSC's and Cherryland's reliance on *Consumers Energy* is misplaced. The Court of Appeals correctly recognized that the case was inapplicable.

3. Great Wolf Lodge's Selection Of A Municipal Electric Provider Was Not A "Transfer" From One Utility To Another.

The second prong of the test under Rule 411 is whether there is a "transfer" of service from one utility to another. If there is no such transfer, Rule 411 did not require that Great Wolf Lodge take electric service from Cherryland.

Under its option Great Lakes Companies planned to obtain a property cleared of all structures so it could build on that property. As a result, Great Lakes Properties was aware that it would have a vacant parcel in service territory where three electric providers could serve a new customer – Consumers Energy, Cherryland, and Traverse City Light and Power – and thereby let out the electric service for bids to those three electric providers. All three submitted bids, including Cherryland.

¹ In briefs, Cherryland asserts that there was a blanket easement to cross the property. That refers to crossing the property to serve customers in the area. Cherryland has a transmission line that crosses the property. That does not make a subsequent purchaser a customer. Consumers and Traverse City Light & Power also had easements and had facilities on the property. The fact remains that Cherryland refused to remove its service line to a building upon request, and that the then-owner of the property had the right to have that line removed.

The request made by GDO Investments, and the bids requested by Great Lakes Companies, were not seeking a “transfer” from one utility to another. Rather, Great Lakes Companies sought to become a new customer of the winning bidder, Traverse City Light & Power, which is a non-PSC regulated, municipal electric service provider, which is not a “utility” for purposes of Rule 411.

A “utility,” under MAC R 460.3102(1), includes only “an electric company, whether private, corporate, or cooperative, that operates under the jurisdiction of the commission.” (Emphasis added). A municipal electric provider does not operate “under the jurisdiction of the commission” and is exempt from PSC jurisdiction pursuant to MCL 460.6. Consequently, Great Wolf Lodge’s selection of a municipal provider did not invoke Rule 411 because there is no transfer from one “utility” to another “utility”.

The requirement that there be a transfer from one utility to another is also another reason why *Consumers Energy* does not apply to this case. The dispute in *Consumers Energy* was over whether Consumers (a private utility regulated by the MPSC) or Great Lakes Energy Cooperative (a cooperative electric utility regulated by the MPSC) had the right to supply electricity to a Meijer store that was a Consumers customer.

The policy of this state is that municipal electric providers are not subject to PSC regulation; they are regulated by their municipalities. MCL 460.6 expressly excludes municipally-owned electric service providers from PSC jurisdiction. As recently as 2008 the Legislature reaffirmed this policy in the Clean, Renewable, and Efficient Energy Act, part 2 of which applies certain requirements for renewable energy plans and energy optimization plans to municipal providers. The statute further provides: “This part does not provide the commission with new authority with respect to municipally-owned electric utilities except to the extent expressly

provided in this act.” MCL 460.1111. Appellants, meanwhile, are seeking to extend the PSC’s authority to govern even expressly-exempted providers through the use of the *Consumers Energy* case.

In this case, by contrast, Great Wolf Lodge signed a contract for service with a municipal service provider, which is not regulated by the PSC. The providers in this case were a utility and a non-utility under the PSC’s own rules, and Great Wolf Lodge had never been a customer of either.

4. The Court Of Appeals Correctly Applied The Plain Meaning Of MCL 124.3.

In 2002, Cherryland’s refusal to remove a service drop, a refusal which would have delayed the Lodge such that Great Wolf Lodge would have lost revenue from Spring break in 2002, essentially prevented Great Wolf Lodge from honoring the low bid and its existing contract with Traverse City Light & Power. Appellants claim that Cherryland acted properly based on MCL 124.3. The Court of Appeals disagreed, and found there is an issue of fact as to whether there was a customer receiving service in 2001-2002. The Court of Appeals is correct, and Cherryland and the PSC are wrong.

MCL 124.3 provides that a municipal electric provider may not provide power to “customers outside its corporate limits already receiving the service from another utility.” The Court of Appeals, in applying the plain meaning of the words used, found that the term “customer” could be the same in both MCL 124.3 and in Rule 411, but the prohibition in MCL 124.3 was itself different in that a customer cannot be provided service if it is “already receiving service” from another utility. Thus, the Court of Appeals was in fact applying the same definition of customer (the buildings and facilities served) but found that the customer must

already be receiving service from another utility in order for the prohibition to apply. That is in fact the plain meaning of the statute.

The key phrase is “to customers already receiving the service from another utility.” That is, Great Wolf Lodge must have “already been receiving service” from Cherryland to prevent the choice of a municipal provider when, in fact, Great Wolf Lodge had contracted for service from Traverse City Light & Power. That is simply not the case. First, as Great Wolf Lodge has demonstrated, Great Wolf Lodge was never an “existing customer” of Cherryland under the express language of Rule 411. Second, MCL 124.3 is part of a section of the code applying to municipalities and municipal-owned electric service providers, which MCL 460.6 expressly exempts from the PSC’s jurisdiction. Rule 411 does not take precedence over a duly enacted statute that applies to the very municipal providers exempted from the PSC’s, and Rule 411’s, jurisdiction.

The Court of Appeals correctly applied MCL 124.3 and allowed Great Wolf Lodge to have a hearing to determine whether Great Wolf Lodge was a customer “already receiving electric service” from Cherryland in 2001. There is no reason to change that ruling, which is based on the plain meaning of the statute.

5. The Court Of Appeals Properly Addressed The Gordon Foods Decision As Being On Point And Persuasive In Determining Where Rule 411 And MCL 124.3, Respectively, Applied.

In a previously filed case in Grand Traverse County Circuit Court, Cherryland sought a ruling from that court that MCL 124.3 prevented TCL&P from serving Gordon Food Service at a site where Cherryland had previously served an entirely different customer with different buildings that had been demolished. *Cherryland Electric Cooperative v Traverse City Light & Power*, Grand Traverse County Circuit Court Case No. 01-21871-CZ, *Court’s Decision at Non-*

Jury Trial, June 27, 2002 (the “*Gordon Food Service* case”) A copy of the transcript of the ruling is included in Cherryland’s Appendix, pp. 28a – 50a.

The Circuit Court instead properly found that “customers...already receiving service from another utility” meant, at a minimum, the same buildings that had been previously served, and not merely the same piece of land. Thus, TCL&P was permitted to serve Gordon Food Service’s new buildings, despite Cherryland’s prior service to a different “customer” (*i.e.*, a different entity in different buildings) on the same parcel. The *Gordon Food Service* case, then, is factually indistinguishable from the present case, in which Cherryland had formerly served the Oleson’s old building, on the same land but in different buildings from the new Resort buildings.

Great Wolf Lodge cited this case as persuasive authority to the Court of Appeals, both because of the similar fact situations and the legal analysis of the differences between Rule 411 and MCL 124.3. The Court of Appeals agreed with Great Wolf Lodge, finding the reasoning of the Grand Traverse Circuit Court persuasive. MPSC’s Appendix, p. 104a.

MCL 124.3, which governs municipal electric providers, contains language similar but not identical to MAC R 460.3411, stating that a “municipal corporation shall not render electric delivery service...to customers outside its corporate limits already receiving service from another utility unless the serving utility consents in writing.” The phrase “already receiving service” is not the same as the phrase “existing customer” that is used in MAC R 460.3411 and relied upon by *Consumers Energy*. This is another distinguishing factor from that case. Consequently, since Great Wolf Lodge was not “already receiving service” from Cherryland, MCL 124.3, which was the applicable law rather than Rule 411, did not prevent Great Wolf Lodge from selecting TCL&P.

Cherryland also claims it is undisputed that Cherryland had served the property since 1940 and undisputed that Cherryland has been and still is providing service. Those statements are also misleading. They are not undisputed. No factual record has been developed to determine whether Cherryland served the parcel of land, an issue that is not relevant anyway since the issue is whether a “customer” is “already receiving service” from Cherryland and not whether the parcel of land was ever served in the past. Further, the whole point of the complaint below is that Cherryland forced Great Wolf Lodge to take service under protest and under duress, as is expressly acknowledged in the Court of Appeals’ opinion.

Cherryland also attempts to distinguish *Gordon Food Service* by claiming it was wrongly decided and that it stands for the proposition that a new customer is created when an entity purchases property and razes all the facilities, which Cherryland refers to as “poaching” the utility’s customers. That is a gross mischaracterization of what the Court of Appeals held. The decision held that the combination of 1) a complete change in use of the parcel, 2) together with demolition or removal of all existing buildings and replacement with a new structure, and 3) a provider is eligible to provide service to the same area, results in an end to the customer relationship under MCL 124.3. The Court of Appeals phrased its test somewhat differently, stating that:

The relevant inquiry is whether, under these facts, there were buildings or facilities on the site in question that were "already receiving" electric service from Cherryland at the time Great Wolf came to the site and sought service from TCL&P. The inquiry thus shifts from determining whether there was an "existing customer," as would be appropriate for Rule 411 analysis, to determining whether a customer was "already receiving" service.

[See MPSC’s Appendix, p. 103a – 104a.]

This is not simply selling the property and razing the buildings. Nor is it “poaching” customers. The existing buildings must not be receiving service from the prior owner’s electric

provider. In other words, there is no customer. Thus, there is no customer to be poached. Cherryland is not selling electricity to anyone before the new resort is built, and is not selling electricity to anyone afterwards. There is no customer to “poach.”

Cherryland also claims the amendment of MCL 124.3 and the enactment of MCL 460.10y somehow changes the result. However, as the Court of Appeals points out, the definition in MCL 460.10y is the same. A customer is “the buildings and facilities served”, not the parcel of land on which those buildings and facilities sit.

Cherryland also argues that the purpose of Rule 411 is to avoid duplication of facilities, and that following *Gordon Food Service* will defeat the purpose of Rule 411 because the ruling allows customers to freely transfer. Cherryland here is crying crocodile tears. The facilities “duplicated” here was merely a wire – a service line that had to be removed anyway to allow the buildings to be razed. And, as stated above, the Court of Appeals’ decision does not allow a “free” transfer. There was nothing to transfer because there was no customer receiving service.

C. THE COURT OF APPEALS CORRECTLY AFFIRMED THE CIRCUIT COURT’S DETERMINATION TO REMAND TO THE PSC FOR A DETERMINATION OF INTEREST WHERE THE RECORD SHOWS THAT CHERRYLAND CHARGED GREAT WOLF LODGE AN IMPROPER AND UNAUTHORIZED RATE AND HAD THE BENEFIT OF GREAT WOLF LODGE’S FUNDS DUE TO THE CHARGING OF AN UNAUTHORIZED RATE.

The second issue on which leave to appeal was granted was whether the PSC “must impose interest on the refund it ordered.” In affirming the Circuit Court’s remand to determine interest, the Court of Appeals correctly determined that the PSC had erred in treating interest as some kind of penalty and concluded that “an award of interest on top of the nominal dollars found to have been overpaid is necessary to restore Great Wolf to its original condition.” Cherryland’s Appendix, p. 854a.

In the underlying Order in PSC Case U-14593, the PSC ordered Cherryland to refund to Great Wolf Lodge the overcharges made as a direct result that Cherryland had charged an unauthorized rate. PSC's Appendix, p. 79a. Neither Cherryland nor the PSC appealed that ruling, and it is now the law of the case.

Despite the finding that the plain language of the order in Case U-13716 that Cherryland was to charge the large resort rate to Great Wolf Lodge, and that Cherryland disobeyed that order, the MPSC denied interest on the overcharge, finding that Cherryland's action "was not so clearly unreasonable as to justify the imposition of a fine or interest on the refund to GWL." PSC Appendix, p. 79a. The PSC thus took the position that an award of interest on the overcharge was tied to the issue of whether a fine was appropriate.

The Circuit Court correctly reversed this injustice, and remanded the matter to the PSC for a determination of the interest rate to be applied. The Court of Appeals affirmed and cited *Detroit Edison Co v PSC*, 155 Mich App 461; 400 NW2d 644 (1986) for the proposition that the PSC is authorized to award interest on customer refunds, and also cited *Xerox Corp v Oakland County*, 191 Mich App 433; 478 NW2d 702 (1991) for the proposition that interest is part of the judgment and not a penalty. Cherryland's Appendix, pp. 853a – 854a.

The PSC argues that the Circuit Court erred in reversing the PSC's failure to assess interest. It is of more than note here that Cherryland, the party that would be aggrieved by an award of interest in this case, did not appeal the remand ordered by the Circuit Court to the Court of Appeals.

The PSC first argues that, had Cherryland followed the PSC's procedure and requested a clarification from the PSC, the PSC may have allowed the change in rates. The PSC's order found that "Incorporated in the application filed in Case U-13716, and never questioned by the

parties, was the assumption that GWL was in compliance with all of the terms and conditions of the LRS rate.” PSC Appendix, p. 79a. Any reasoning to the contrary is pure speculation.

The PSC also argues that this was not a typical case where a customer claims it is being charged under the wrong tariff, but is just a utility failing to seek clarification of an order. That is also not the case. This is a case of a utility directly disobeying an order to apply a specific rate to a customer. That is worse than simply failing to seek clarification; it is a direct violation of an order. The PSC found the plain language of its order required the large resort rate to be applied. The failure to seek clarification simply meant that, if Cherryland wanted to apply a different rate, Cherryland had to go back to the PSC for permission to do so. That Cherryland failed to do.

The PSC also mischaracterizes the refund, and even cites the Court of Appeals’ statement that the PSC considered interest a penalty as evidence that the Court of Appeals somehow substituted a value judgment on whether a penalty was necessary. However, the Court of Appeals’ ruling was not that the PSC should have imposed a penalty, but that Great Wolf Lodge was entitled to interest not as a penalty but as compensation for the lost time-value of money. The refund in this case was not a “penalty paid to them for Cherryland’s failure to seek clarification,” as the PSC argues. The refund was due because Cherryland had charged Great Wolf Lodge an unauthorized rate, in effect a forced loan to Cherryland, and that interest was required to make Great Wolf Lodge whole.

It is undisputed that Cherryland took it upon itself to substantially hike the ordered rate charged to Great Wolf Lodge without first seeking guidance or approval from the Commission. The PSC clearly based its decision not to award interest by combining the decision with a related decision not to assess a fine. In so arguing, the PSC completely commingles the concepts of

finances and interest, and thereby argues it can only apply interest as a penalty against a monopoly utility.

The interest sought by Great Wolf Lodge in this case was not in the nature of a penalty to be lumped in together with fines. Instead, Great Wolf Lodge sought interest simply as a matter of fundamental fairness to recover its economic loss as well as to assure that Cherryland did not unjustly benefit from the intentional overcharge by way of having an interest-free loan. Instead, the PSC's Order rewarded the utility for the intentional unlawful overcharge of the customer, while twisting the customer's arm to sign a contract it disliked, as found by the administrative law judge. Cherryland's Appendix, pp. 633a – 637a.

The law in Michigan grants the PSC the authority to grant interest as an element of damages for overcharges, and to set the rate for such interest. *Detroit Edison v PSC* encompasses the ability to include interest with a refund when a higher than appropriate rate (in that case an interim rate) was charged, as well as the ability to determine what that interest rate should be. The Court of Appeals stated at page 469:

We believe that the determination of the rate of interest to be applied to customer refunds falls within this broad grant of authority. The selected rate of interest has a direct impact on the fees and charges that a utility's customers ultimately pay for service.

The Court of Appeals in *Detroit Edison v PSC* goes on to cite to the overall monetary impact of interest in that case, and concludes that the rate of interest is “at least incident to the regulation of a public utility.” *Detroit Edison v PSC*, at 469. Here there is no question that Cherryland's rates are subject to the PSC's jurisdiction. Awarding interest on an overcharge, and determining the rate of interest to apply, is incident to that authority to set rates.

The failure to include interest was an erroneous interpretation of the law of interest as a part of damages. This law is well stated in *Michigan Law of Damages and Other Remedies*:²

A discussion of interest must begin with the distinction between interest as an element of damages and interest on a money judgment. For more than 100 years, courts have recognized that complete compensation of the plaintiff can only be accomplished if the plaintiff is awarded interest from the date of the injury. *Snow v Nowlin*, 43 Mich 383, 387; 5 NW 443 (1880); *McCreery v Green*, 38 Mich 172, 185 (1878). In addition, by statute, once a money judgment is entered, interest accrues on the judgment until it is paid. Michigan courts have, therefore, recognized a distinction between interest included as an element of damages and interest on a judgment. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 499 n9; 475 NW2d 704 (1991); *Schwartz v Piper Aircraft Corp*, 90 Mich App 324, 325 n2; 282 NW2d 306 (1979). The former has evolved judicially; the latter is purely statutory. While these two forms of interest have developed differently and cover a different time period within the course of a single case, they share a common purpose – compensating the plaintiff for the loss of the use of funds. *Gordon Sel-Way*, 438 Mich at 499 n9; *Moore v Department of Military Affairs*, 88 Mich App 657, 660; 278 NW2d 711 (1979) (citations omitted).

Interest as an element of damages is awarded by the trier of fact as part of the general verdict, whereas interest on a money judgment is computed on and added to the judgment. *Vannoy v Warren*, 26 Mich App 283; 182 NW2d 65 (1970), *aff'd*, 386 Mich 686; 194 NW2d (1972). The two forms of interest are cumulative rather than mutually exclusive. See *McGraw v Parsons*, 142 Mich App 22; 369 NW2d 251 (1985). The *McGraw* court held that awarding interest as damages in a verdict does not preclude the assessment of statutory interest on the judgment.

Great Wolf Lodge sought interest for just this purpose – to be compensated for the loss of use of its funds. Great Wolf Lodge has been without the use of these funds since it was forced to begin paying the higher rate in November 2004 (for October 2004 usage) and in later billings. Consequently, Cherryland has had the benefit of a forced loan from Great Wolf Lodge in the amounts of the overpayments, and Great Wolf Lodge has been economically damaged by that

² Patek, Barbara A., McLain, Patrick, Granzotto, Mark, and Stockmeyer, N. O., Jr., *Michigan Law of Damages and Other Remedies*, Third Edition, The Institute of Continuing Legal Education, pp. 28.2 – 28.3 (2002) (Emphasis added).

forced loan. That is part of damages, not a form of penalty to be lumped together with the issue of fines.

The PSC attempts to distinguish *Detroit Edison v PSC* by claiming that the case does not require interest on customer refunds, and again cites the wholly unsupported claim that the LRS rate improperly shielded Great Wolf Lodge from paying the appropriate rate. This is precisely the opposite of what the PSC actually stated was the purpose of applying the LRS rate for one year: that it was in the public interest and was intended to protect the customer. Moreover, there is nothing in the record in this case to indicate that any other rate other than the LRS rate was appropriate to apply to Great Wolf Lodge.

No part of the MPSC's order in Case No. U-14593 ever stated that there was any shield from the proper rate to be charged. Rather, the order specifically finds that it ordered application of one rate, and Cherryland charged another rate without authorization. Indeed, the PSC in the rate order in Case No. U-13716 expressly found that "because the Commission agrees that the LRS rate is in the public interest as applied to GWL, the Commission finds that the LRS rate should be approved on a temporary basis to avoid any harm to GWL." See PSC Appendix B, p. 8. There is no statement that the improper higher rate was the appropriate rate or that the rate ordered to be charged for one year was not the appropriate rate. The PSC's Order instead agrees that Great Wolf Lodge was overcharged by Cherryland, but lumps the interest issue in with the issue of whether a fine is appropriate.

Thus, the law in Michigan calls for interest in these circumstances, and the PSC has the authority to set the rate. The Circuit Court was perfectly correct in remanding this matter to the PSC to determine the proper rate of interest to apply, and the Court of Appeals was correct in affirming the Circuit Court. There is no reason for this Court to disturb that ruling.

D. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THIS MATTER SHOULD BE REMANDED FOR A DETERMINATION OF FINES WHERE THE RECORD SHOWS THAT CHERRYLAND CHARGED AN UNAUTHORIZED RATE, IN DIRECT CONTRADICTION TO THE COMMISSION'S DIRECT ORDER AND THAT THE PLAIN MEANING OF THE STATUTE REQUIRES A FINE WHERE THE UTILITY NEGLECTS TO CHARGE A REQUIRED RATE.

The third and final issue on which leave was granted was whether the PSC “must levy a fine, under MCL 460.558, on Cherryland.” MCL 460.552 provides that an electric utility must charge only a rate approved by the PSC. In Case U-13716, the PSC set a specified rate to apply to the Lodge facilities for a period of one year. Less than a year later, Cherryland unilaterally changed the specific rate approved for the Lodge, and instead charged another rate. MCL 460.558 requires a penalty for an electric utility “who willfully or knowingly fails or neglects to obey or comply” [emphasis added] with a PSC order. *Great Wolf Lodge of Traverse City, LLC v PSC, supra*, at 25.

The Court of Appeals found that MCL 460.552 and 460.558 operate together to establish that electricity utilities must charge approved rates, and that violations of that duty “shall” result in penalties. The Court of Appeals further determined that the statutes also require penalties in the case of neglect. Because the PSC found in its own order that Cherryland should have sought clarification rather than unilaterally changing the rate set for one year in the Commission’s prior order, the PSC provided factual findings of neglect, thereby requiring a penalty.

1. The Only Record Facts Indicate That Cherryland Knowingly Or Neglectfully Charged Great Wolf Lodge An Unauthorized Rate.

The PSC and Cherryland argue that, because the rate Cherryland improperly charged Great Wolf Lodge was allegedly predicated on the assumption that Great Wolf Lodge had not met a minimum load requirement of a tariff that had been rejected by the PSC, the determination not to assess a fine was warranted. That is not the case. There is absolutely no record evidence

before the PSC or in any docket that Great Wolf Lodge did not meet the terms of the rejected tariff. No evidentiary record was made on that issue or any other issue, since Great Wolf Lodge was denied a hearing.

In their briefs, Appellants focus on the load requirement from the rejected tariff, but ignore that the status quo was the specific rate that was applied to Great Wolf Lodge for one year in the PSC Order in Case U-13716. That Order stated:

The application filed by Cherryland Electric Cooperative on February 24, 2003 for approval of a large resort service tariff is rejected, but the rate currently charged by Cherryland to Great Wolf Lodge is approved on a temporary basis for one year from the date of this order or the date that a special contract becomes effective, whichever occurs first.

MPSC Appendix. p. 12a. [Emphasis added.]

Note that the order did not keep the rules and regulations of the tariff in effect; the order rejected the tariff and only applied the rate. Moreover, the order applying the rate for one year was not appealed, and the findings in the case below that the improper rate was the incorrect rate, along with a refund to Great Wolf Lodge in this case, was not appealed

In fact, the very PSC order underlying this appeal and cited by the PSC specifically found that the load requirements did not change the PSC's prior order that Great Wolf Lodge be kept on a specific, ordered rate for a period of one year. The PSC issued its Opinion and Order on May 25, 2006. (PSC Appendix, pp. 65a – 84a.) The Opinion and Order found that:

Thus, the plain language of the order [in Case U-13716] provided that Cherryland continue to charge the LRS rate for up to one year. The Commission intended to preserve the status quo between the parties while they worked out the terms of a special contract. Incorporated in the application filed in Case No. U-13716, and never questioned by the parties, was the assumption that GWL was in compliance with all of the terms and conditions of the LRS rate. Therefore, the Commission finds that Cherryland should have continued charging the LRS rate to GWL until July 22, 2005 as stated in the order. Cherryland's subsequent concerns about charging GWL an inappropriate rate are recognized. However, in the unique circumstances of this case, Cherryland should

have sought clarification of the July 22 order. Cherryland failed to do so and instead switched GWL to its LCI rate, which, although Commission-approved, was not the rate approved in the July 22 order.

[PSC Appendix, p. 79a, emphasis added]

Thus, the PSC expressly found that:

- 1) The plain language of the order required Cherryland to charge the LRS rate for one year;
- 2) If Cherryland was concerned about eligibility or wanted to charge another rate, it should have sought clarification from the PSC; and
- 3) Cherryland instead unilaterally charged the much higher LCI rate, which was not the rate approved in the July 22 order.

The PSC did not find that that the terms of the rejected tariff had not been met. It could not do so because there was no record on which such a finding could be based. Rather, the PSC found that meeting the tariff conditions was presumed and unchallenged by the parties. These factual statements by the PSC are undisputed, and were not appealed by any party, nor was the order requiring Cherryland to refund the overcharges to Great Wolf Lodge. No party should now be heard to argue that the rejected tariff conditions were not met.

2. MCL 460.552 Requires A Fine.

The PSC argues that the Circuit Court improperly applied MCL 460.552 and MCL 460.558. MCL 460.552 provides as follows:

The Michigan public utilities commission, hereinafter referred to as "the commission" shall have control and supervision of the business of transmitting and supplying electricity as mentioned in the first [1st] section of this act and no public utility supplying electricity shall put into force any rate or charge for the same without first petitioning said commission for authority to initiate or put into force such rate or charge and securing the affirmative action of the commission approving said rate or charge. [Emphasis added]

Thus, under this Act, Cherryland could not charge Great Wolf Lodge a rate without first seeking the affirmative approval of the PSC. There is nothing discretionary about MCL 460.552. If the utility charges an unauthorized rate, the utility is in violation of the statute.

MCL 460.558, which follows MCL 460.552 in the electric transmission act, and together were the provisions that were the premise of the fines imposed in PSC Case U-13716 for the charging of an unapproved rate by Cherryland, provides as follows:

Every corporation, its officers, agents and employees, and all persons and firms engaged in the business of furnishing electricity as aforesaid shall obey and comply with every lawful order made by the commission under the authority of this act so long as the same shall remain in force. Any corporation or person engaged in such business or any officer, agent, or employee thereof, who willfully or knowingly fails or neglects to obey or comply with such order or any provision of this act shall forfeit to the state of Michigan not to exceed the sum of three hundred [300] dollars for each offense. Every distinct violation of any such order or of this act, shall be a separate offense, and in case of a continued violation, each day shall be deemed a separate offense. An action to recover such forfeiture may be brought in any court of competent jurisdiction in this state in the name of the people of the state of Michigan, and all moneys recovered in any such action, together with the costs thereof, shall be paid into the state treasury to the credit of the general fund. [Emphasis added]

Thus, if a company:

- willfully OR
- knowingly OR
- neglects to obey or comply with a lawful order, THEN
- the company SHALL pay a fine.

On the record below, there is no doubt that this section applies to this case. The PSC, in an unappealed ruling below, found that Cherryland did not charge the rate it was ordered to charge and did not, as required, seek PSC approval before changing rates. Therefore, as the Court of Appeals found, “The PSC's decision to overlook that negligence (or worse) by not

imposing a fine was thus unlawful as a violation of its statutory duty in the matter, as the circuit court declared.” Cherryland’s Appendix, p. 853a.

Under these express findings in the very PSC order that was the subject of the appeal to the Circuit Court, there is a violation of MCL 460.552 because Cherryland charged a rate to Great Wolf Lodge that was different than the rate authorized in a currently effective PSC order “without first petitioning said commission for authority to initiate or put into force such rate or charge.”

There was also a clear violation of MCL 460.558 because

- 1) Cherryland did not “obey and comply with every lawful order made by the commission,”
- 2) Regardless of motive, Cherryland “neglected to obey or comply” with the PSC’s previous order, and
- 3) Regardless of motive, Cherryland “neglected to obey or comply” with “any provision of this act,” that being the violation of MCL 460.552 (charging a rate without seeking authority to charge that rate).

Cherryland argues that this is misinterpretation of the statute, stating that a fine is only required if Cherryland willfully or knowingly failed or neglected, claiming that the neglect itself must be willful or knowing.

Black’s Law Dictionary, Seventh Edition, defines “neglect” as follows:

The omission of proper attention to a person or thing, whether inadvertent, negligent, or willful; the act or condition of disregarding.

Appellee’s Appendix, p. 69b.

The “willful” portion of this definition is already covered in the statute by the phrase “willfully or knowingly fails to obey or comply.” Since a willful neglect already results in

a failure to obey or comply, the word “neglect” in the statute must have the meaning of “inadvertent neglect” or “negligent neglect” applied in the definition. Cherryland’s interpretation of the MCL 460.558 would effectively read the term “neglect” out of the statute, because the term would be superfluous if the neglect had to be willful or knowing since that conduct is already covered by other terms in the same sentence. Thus, the Court of Appeals correctly interpreted the statute in finding that a neglectful noncompliance is also subject to the mandatory penalties.

Cherryland also argues that there was “no evidence” presented that Cherryland’s conduct was carried out in disregard of the legality of a Commission order. This is also not the case. There was significant circumstantial evidence presented. For example, inferences can be drawn by the time line involved. On July 14, 2005, the PSC set the rate for one year or until a special contract was approved, whichever occurred first. PSC Appendix, pp. 1a – 14a. On October 14, the PSC dismissed the special contract because Great Wolf Lodge did not agree to Cherryland’s unilateral terms. PSC Appendix, pp. 17a – 20a. One month later, the very next billing cycle after the unilateral special contract was disapproved, Cherryland unilaterally raised Great Wolf Lodge’s rate.

In addition, Cherryland’s language in dealing with Great Wolf Lodge provided circumstantial evidence of improper conduct by Cherryland. As the Administrative Law Judge noted in his Proposal for Decision below:

Exhibit G of Cherryland’s Motion for Summary Disposition is a January 10, 2005 e-mail from Cherryland’s General Manager, Tony Anderson, to GWL’s Ms. MacDonald.³ In the e-mail, Mr. Anderson states that the purported reason for the rate change was GWL never meeting the 1500 kW requirement, and, shortly thereafter, adds that “we have the special

³ See Cherryland Appendix, p. 185a.

contract addendum ready for signature.” Mot Summ Disp, Exh G. Additionally, he adds:

We do recognize the increase to your monthly bill and take no pleasure in having to follow the letter of the law as we see it. I hope your company will remember that we did previously pay a substantial fine to the MPSC for not doing so in the past. We simply will not take such a risk again when the solution is in the hands and control of your corporate headquarters. Mot Summ Disp, Exh G. (emphasis added).

From Exhibit G, it appears clear that, while Cherryland justified its actions on a desire to follow the “law as [it] see[s] it,” it had expressly connected and mixed together what should have been two unrelated issues; its application of the LCI rate and GWL’s refusal to sign the proposed special contract. In fact, it appears quite clear that Cherryland was identifying GWL’s refusal to sign the proposed special contract as the reason for its decision to change rates. However, Cherryland’s duty and ability to comply with Commission Orders was unrelated to GWL’s refusal to sign the proposed special contract. By linking the two issues, Cherryland was using the higher rate to punish GWL for its refusal to sign the special contract and, at the same time, to pressure GWL into signing a contract it opposed. This type of behavior is impermissible.

Proposal for Decision, Case U-14593, February 22, 2006, Cherryland’s Appendix, pp. 634a – 635a. [Footnote added]

While the PSC did not reach the same conclusion, it is disingenuous for Cherryland to argue that there was no evidence presented that Cherryland’s conduct was carried out in disregard of the legality of a Commission order.

Finally, the PSC cites *Ameritech Mich v PSC (In re MCI Telecomms. Corp)*, 240 Mich. App 292; 612 NW2d 826 (2000) as standing for the concept that the PSC has discretion to decline to issue a fine. However, this case is completely inapplicable. First, the telecommunications case did not deal with an electric utility statute that involved language that those companies in violation “shall forfeit to the state of Michigan.” Moreover, the case dealt with the issue of issuing a fine for contempt of a PSC order, not for violation of a statute. The issuance of an order of contempt rests in the sound discretion of the trial court, and is reviewed

only for an abuse of discretion. *Davis v Henry (In re Contempt of Henry)*, 282 Mich App 656; 765 NW2d 44 (2009) This case deals not with contempt but with a statutory violation where the statute specifically prescribes the penalty.

There is no discretion in MCL 460.552 and MCL 460.558, and whatever discretion the PSC attempted to use below was not based on any facts in the record. Neither Cherryland nor the PSC had any basis in the record to conclude that Cherryland's actions were "reasonable." The Court of Appeals properly recognized this, as had the administrative law judge below, and there is no basis for this Court to revisit the issue.

The Court of Appeals properly applied the meaning of "neglect." Cherryland failed to comply with the Commission order, thereby failing to live up to its statutory duty. Whether the reason was willful or simply neglectful does not matter. Cherryland has not kept the performance of the duty as it ought to have done, whether intentionally or negligently. There is no dispute as to this. Therefore, the Court of Appeals properly applied the statutory term of "neglect" and there is no reason to disturb its ruling.

3. Great Wolf Lodge Has An Interest In The Imposition Of Fines.

Cherryland separately argues that Great Wolf Lodge would only have the required interest as an aggrieved party if it could participate in the fines collected, and cites several cases setting forth the standard for standing. But, under this theory, the PSC could not appeal or brief this issue either. The State would obtain the fines in the general fund (MCL 460.558). The PSC would not keep the fines. It is interesting that the PSC, which raised this issue in its application for leave to appeal, drops the issue in its brief, while Cherryland, which did not raise the issue in its application for leave to appeal, now raises the issue.

In any event, Great Wolf Lodge does have standing. The question of standing is whether the party filing an appeal is aggrieved. There must be a real dispute rather than a simply

hypothetical one, and one where the appealing party has a particularized injury. There must be an injury arising from the actions of the trial court. The appealing party must benefit from a change in the judgment below. *Manuel v Gill*, 481 Mich 637; 753 NW2d 48 (2008).

There are other ways of being aggrieved beyond participation in the fines. Great Wolf Lodge can be harmed if Cherryland were to again unilaterally change its rate. This is already the second time Cherryland charged an unauthorized rate. Cherryland was fined the first time. Not fining Cherryland on the second occasion sends the signal that Cherryland may do so again with impunity if it has no prospect of being fined for doing so. The fine protects ratepayers, and in particular Great Wolf Lodge, which has experienced Cherryland's unlawful heavy-handed behavior first hand repeatedly.

In *Wayne County Prosecutor v Parole Board*, 210 Mich App 148; 532 NW2d 899 (1995), the Court of Appeals recognized the standing of a victim of a crime to appeal a parole board decision based on the statutory intent to benefit the victim. While that decision dealt with the parole statutes, the reasoning is the same here. Ratepayers are benefited by the electric transmission act, from which the fines in this case would flow. MCL 460.551 states that the state will regulate customers' rates. MCL 460.552 provides that the utility cannot charge a rate that is not authorized by the PSC. The statute is intended to protect end users, and in this case Great Wolf Lodge is not only an end user, but is the specific end user aggrieved by Cherryland's conduct.

Great Wolf Lodge also has a particularized injury in this case because it was the aggrieved party below and because the order at issue involved Cherryland's illegal actions taken directly against Great Wolf Lodge. Great Wolf Lodge is an aggrieved party in that the failure to

issue fines fails to protect Great Wolf Lodge in the future from repeated illegal conduct by Cherryland.

In short, there is no error here by the Court of Appeals. Great Wolf Lodge has a concrete and particularized interest in being charged only the authorized rate, and no more. Great Wolf Lodge suffered an “injury in fact” by being charged the unauthorized rate. There was a direct causal connection between Cherryland’s actions (charging an unauthorized rate and violating a PSC order placing a specific rate into effect) and Great Wolf Lodge’s injury (being charged an improper rate). The action by Cherryland was not the action of an independent third party. Great Wolf Lodge has a likely probability that a fine will redress the situation, given that a fine gives Cherryland an inducement not to repeat its behavior, which had directly impacted Great Wolf Lodge and no other ratepayer. See *Lee v Macomb Co Bd of Commr’s*, 464 Mich 726, 737; 629 NW2d 900 (2001). Therefore, Great Wolf Lodge has the particularized interest in and is an aggrieved party entitled to standing on this issue.

III. RELIEF REQUESTED

WHEREFORE, Great Wolf Lodge respectfully requests that this Honorable Court affirm the Court of Appeals’ decision in its entirety and grant Great Wolf Lodge its costs.

Respectfully submitted,

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